

**ORIGINAL**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Yvonne Gonzalez Rogers, Judge

JANE DOE, individually and	)	Motion to Dismiss
on behalf of all others	)	
similarly situated,	)	
	)	
Plaintiff.	)	
	)	
vs.	)	NO. C 22-00051 YGR
	)	
META PLATFORMS, INC. (f/k/a	)	Pages 1 - 34
Facebook, Inc.), a Delaware	)	
corporation.	)	
	)	
Defendant.	)	Oakland, California
	)	Wednesday, December 14, 2022

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**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

APPEARANCES:

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(Appearances continued next page)

Reported By: Raynee H. Mercado, CSR No. 8258

Proceedings reported by electronic/mechanical stenography;  
transcript produced by computer-aided transcription.

A P P E A R A N C E S (CONT'D.)

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--o0o--

Wednesday, December 14, 2022

9:53 a.m.

P R O C E E D I N G S

---oOo---

**THE COURT:** All right. Let me go ahead at this point then and call the Doe versus -- Jane Doe versus Meta Platforms, 22-51.

And while you are reshuffling -- before people leave -- don't leave yet -- I have -- I want to say something in terms of what happened in this case, and I want everybody to hear me.

Do I have -- counsel.

Have a seat in the audience. This won't take long.

It is really important that you all remember how to communicate with the Court. And I have a lot of you in here, which is why I'm raising this issue.

I try to make myself accessible. And I went to put this case on the calendar because of its potential overlap with this MDL.

My courtroom deputy sent an email to both sides explaining that I wanted to put this on the calendar. We received an email back from Ms. Ring without copying opposing counsel.

Now, I think Ms. Ring believed that it wasn't an ex-parte communication, but I disagree, and this is the reason why. In response to whether or not we could have the hearing set after the MDL conference, Ms. Ring advised my courtroom deputy that

1 she didn't think she could prepare for both hearings at the  
2 same time in terms of availability.

3 So my question to you, Ms. Ring, not -- not a real  
4 question, it's somewhat more rhetorical -- and to all of you  
5 is to think, well, what did you expect him to do? He's not  
6 going to make a substantive call as to whether or not to  
7 schedule a hearing when an attorney has told him substantive  
8 information about whether or not they were available.

9 You can tell him, "I'm not available," and not give him a  
10 reason or say you are available, but you can't give him  
11 substantive information without letting the other side know if  
12 you expect that information to be communicated to me. I don't  
13 understand how you expected him to respond.

14 Hold on.

15 It is always best to just copy the other side, to let the  
16 other side know when you're communicating with me. I take  
17 very seriously my reputation for being fair to both sides and  
18 to not communicating with you all individually. That's the  
19 practice pointer for all of you.

20 Let's call the case, and you can make a statement if you'd  
21 like.

22 **THE CLERK:** Now calling civil case 22-51-YGR, Doe  
23 versus Meta Platforms, Inc.

24 Counsel, starting with the plaintiff, please state your  
25 appearance for the record.

1           **THE COURT:** At the mics.

2           **MR. PERLSTADT:** Good morning, Your Honor. Roger  
3 Perlstadt from Edelson PC for plaintiff Jane Doe.

4           I have with me at counsel table Yaman Salahi also of  
5 Edelson and Edward Han from Fields PLLC.

6           **MS. RING:** Good morning, Your Honor. Rose Ring,  
7 Gibson Dunn, on behalf of Meta Platforms.

8           **THE COURT:** All right. You wanted to say something,  
9 Ms. Ring.

10          **MS. RING:** I did, Your Honor, but I'll keep it short.

11          First of all, I'm very sorry. I just wanted to clarify  
12 that my response -- I replied all to say that I had a conflict  
13 in hearings this morning. And I -- I thought I did because on  
14 my calendar, we had blocked off two hours for the MDL  
15 proceeding.

16          And then I was driving and I didn't realize that they were  
17 both before you. So if you were asking to have a hearing this  
18 morning, presumably that conflict could be resolved.

19          So that was the call I made to say I'm sorry, I was wrong,  
20 I don't actually have a conflict, or at least I probably won't  
21 because I would imagine Judge Gonzalez Rogers knows that both  
22 of these hearings are going on and we'll be able to clear  
23 that.

24          I did also mention in the voice -- that was the purpose of  
25 my voicemail to say that I didn't realize the first hearing

1 was you.

2 **THE COURT:** You're right, it was a voicemail. But it  
3 was what followed.

4 **MS. RING:** Your Honor, I'm not arguing with you.  
5 You're right. I did it. I was driving home, it was late. I  
6 just -- I felt that I had inadvertently said something to the  
7 Court that was wrong and I was -- called and left a voicemail.  
8 But you're right, I should not have done that and I won't do  
9 it going forward.

10 **THE COURT:** And -- and as I understand it, it got  
11 plaintiffs' counsel, then we get a big email trying to explain  
12 and trying to undo what had happened.

13 **MS. RING:** Yes. Yes.

14 **THE COURT:** So --

15 **MS. RING:** I was having a difficult day between  
16 schedule and personal, and I called and left a voicemail  
17 because I didn't want to leave what was a mistake pending with  
18 the Court. I was trying to clear it up as soon as I could.  
19 But I should have replied all to that email.

20 **THE COURT:** The other thing I think it's important  
21 for everybody to understand is that in order to deal with the  
22 massive number of cases we have, it is efficient for me to  
23 always deal with things that are alike at once.

24 So I will tell my law clerks: We're going into antitrust  
25 land. Or I'm going into criminal land. Or I'm going to

1 securities land. And if I've got two or three cases, those  
2 are what I work on all at once.

3 So working on this Doe-Meta platforms when I'm also  
4 thinking about the MDL is efficient for me. So even though it  
5 may be inconvenient, it's unfortunately too bad. Because for  
6 me, it is most efficient, and that's the only way that I can  
7 manage my docket.

8 **MS. RING:** I understand, Your Honor. Again, I think  
9 that day was a 17-hour day for me, and I have four hearings  
10 this week. Because the holidays are coming and everyone is  
11 trying to do it. So I -- I certainly understand, and we want  
12 to help the Court in any way we can.

13 **THE COURT:** Well, you won't have too much to do  
14 today.

15 And that is because you should know, Mr. Perlstadt, that  
16 my view is with respect to your case, I am not going to do  
17 anything on -- I am trying -- I'd like to get your case  
18 aligned with what I'm doing on the MDL. And I'm not  
19 interested in making rulings prematurely on your case that may  
20 have impact on what I'm doing on the MDL and everyone else's  
21 cases.

22 There are some real issues with your complaint. And those  
23 are the ones that we're going to deal with. The motion is  
24 going to be granted with leave to amend, and I'm going to put  
25 you on a different schedule, but I'm not going to deal with

1 some of the other issues that I'm still going to have to deal  
2 with in the MDL. It's not -- I want the benefit of all the  
3 briefing from various peoples who are considered, and so I'm  
4 not going to address those now.

5 But I do think there are things that are separate and  
6 apart and distinct about your case that you need to deal with,  
7 and so that's why I said the motion's going to be granted with  
8 leave to amend.

9 So let's go through those.

10 It's my understanding from the briefing with respect to  
11 the product liability that you are not proceeding on the  
12 consumer expectations test, that you are only proceeding on  
13 the risk benefit test theory; is that correct? And if it's  
14 not correct, then you don't have enough allegations in your  
15 complaint to support a consumer expectations test.

16 **MR. PERLSTADT:** Our position -- I'll just repeat what  
17 we said in the briefing.

18 Our position is bystanders can bring claims for product  
19 liability. This was a dangerous product that harmed Ms. --  
20 Ms. Doe as a bystander. She suffered physical injuries for  
21 that.

22 Physical injuries has been described as including both  
23 personal injury and damage to property. So she had other --  
24 other property damage.

25 So I think we have stated enough in the complaint that she



1 suffered physical damage from being a bystander to this -- to  
2 this product even though she wasn't a user of it herself.

3 So I'm -- I think we have -- I'm -- I'm absolutely happy  
4 to hear what you believe is missing from our claim, and I'm  
5 happy to try to replead it, if that's -- sounds like that's  
6 the direction you're going.

7 **THE COURT:** Strict liability under California, there  
8 are three types of product defects, right? Manufacturing,  
9 design, and warning. You agree with me so far?

10 **MR. PERLSTADT:** I'm sorry, manufacturing, design  
11 and...?

12 **THE COURT:** And warning, defects.

13 **MR. PERLSTADT:** Warning, sure.

14 **THE COURT:** Right?

15 **MR. PERLSTADT:** Yes.

16 **THE COURT:** My understanding is you are only  
17 proceeding on a design defect theory, correct?

18 **MR. PERLSTADT:** Correct.

19 **THE COURT:** In order to state a design defect theory,  
20 you must follow -- you must fall under one of two tests, or  
21 both, but you have to satisfy the elements of that test.

22 Are we still on the same page?

23 **MR. PERLSTADT:** Yes, Your Honor.

24 **THE COURT:** Which test are you proceeding under?

25 **MR. PERLSTADT:** I apologize, Your Honor. I would

1 have to --

2 (Inaudible to the Certified Shorthand Reporter.)

3 **THE COURT:** Never speak from the table. We need you  
4 on the mic.

5 **MR. SALAHI:** Your Honor, our primary argument in this  
6 set of briefing --

7 (Off-the-record discussion.)

8 **THE COURT:** You have to -- we don't know who you are.

9 **MR. SALAHI:** Your Honor, Yaman Salahi for the  
10 plaintiff.

11 The primary argument on this iteration of the complaint is  
12 under the risk benefit test.

13 **THE COURT:** Okay. So you concede -- hold on. You  
14 concede that you are not proceeding on a consumer expectations  
15 test; is that correct?

16 **MR. SALAHI:** We haven't made that argument, but if we  
17 have leave to amend, I don't want to waive that opportunity  
18 now without having a chance to take a closer look at that.

19 **THE COURT:** Okay. As I said, there is not sufficient  
20 allegations for the latter, for sure.

21 In any event, the complaint lacks allegations about what  
22 the design defect was in 2012. 2012, ten years ago.

23 **MR. PERLSTADT:** Respectfully, I think our complaint  
24 does set out the design defect.

25 **THE COURT:** I disagree. So what else can you allege,

1 if anything?

2 **MR. PERLSTADT:** We can -- Your Honor, we -- we allege  
3 that the -- the design of Facebook is the -- the way that the  
4 Facebook algorithms work is sort of twofold. It --

5 **THE COURT:** So it's not as if these platforms haven't  
6 changed over time.

7 **MR. PERLSTADT:** Agreed.

8 **THE COURT:** The iPhone in 2008 is very different from  
9 an iPhone in 2022.

10 **MR. PERLSTADT:** Yeah.

11 **THE COURT:** And so here I am ten years later, and I  
12 need to understand what your perspective is about what was the  
13 state of play in 2012.

14 **MR. PERLSTADT:** Our position was -- is that in 2012,  
15 shortly after Facebook was introduced into Burma, the design  
16 of Facebook encouraged the -- the way the feedback mechanisms  
17 work, the share, the like, the comment buttons, and two -- two  
18 parts. The share comment-like feature we allege created these  
19 kind of dopamine hits in -- in content creators. And the --  
20 so the -- and that more extreme content was more likely to get  
21 these reactions. And so the -- the Facebook -- the way  
22 Facebook was designed encouraged posters to create more and  
23 more extreme content.

24 On the other end, the news feed algorithms were designed  
25 in a way that promoted in users news feeds the most extreme

1 content because it was more likely to get views and hits and  
2 impressions.

3 And so the way that Facebook was designed, we allege, was  
4 in a manner that both encouraged the creation of more and more  
5 extreme, more and more violent content, more and more hateful  
6 against L groups, as well as promoted and amplified that kind  
7 of content. And we think that -- that was -- we -- we allege  
8 that that was what was going on in 2012.

9 **THE COURT:** Any response, Ms. Ring?

10 **MS. RING:** Your Honor, we don't -- we don't think the  
11 complaint -- the plaintiff here, as you know, alleges that  
12 there was an attack on her village in 2012 that caused her to  
13 flee. We don't think that there are any allegations in the  
14 complaint that would support a reasonable inference that that  
15 attack in 2012 had anything to do with Facebook.

16 Facebook was introduced into Burma in 2011, and there are  
17 no allegations that anyone that was involved in that -- in  
18 that attack in 2012 or anyone who plaintiffs allege otherwise  
19 would have stood up and fought against the military to prevent  
20 that attack even used Facebook, let alone viewed any of the  
21 content that plaintiffs alleged caused, you know, the  
22 further -- further creation of that content or the wide  
23 dissemination of it.

24 So we think more fundamentally there are no factual  
25 allegations. Whatever the allegations about how Facebook

1 operates are, there are no factual allegations that would  
2 support a reasonable inference that what happened in 2012 to  
3 the plaintiff here had anything to do with Facebook.

4 **MR. PERLSTADT:** Could I respond to that, Your Honor?

5 **THE COURT:** Yeah. I think I -- I mean I agree with  
6 Ms. Ring. The causation allegations in this complaint are  
7 lacking. I mean -- in -- the complaint has to allege that  
8 Meta's conduct was a substantial factor. That's the law. A  
9 substantial factor in bringing about these ethnic attacks.  
10 And I just --

11 **MR. PERLSTADT:** If I may, Your Honor.

12 **THE COURT:** You may.

13 **MR. PERLSTADT:** I -- I agree, substantial factor is  
14 absolutely the test. It's -- it's sort of a generous test  
15 though, it's more than negligible or theoretical.

16 And with respect to what was going on in 2012  
17 specifically, we allege in paragraph 94 that posts early in  
18 2012 about -- there were posts in 2012 about the alleged rape  
19 and murder of a Buddhist women by Rohingya men, and that went  
20 viral, contributed to violence that year.

21 I went back and reread some of the reports, some of the  
22 news reports, some of the UN reports. This is a big deal,  
23 this -- this specific post that went viral about the -- the  
24 alleged rape and murder of a Buddhist women by Rohingya men  
25 in early 2012, and that's in paragraph 94.

1 In paragraph 115, we also talk about Facebook posts and  
2 audiovisual materials on Facebook dehumanizing Rohingya  
3 people, calling them Bengali invaders and existential  
4 threat --

5 (Clarification by the Certified Stenographic Reporter.)

6 **MR. PERLSTADT:** I'm sorry.

7 Dehumanizing the Rohingya people, calling them Bengali  
8 invaders and an existential threat to -- to Myanmar, that  
9 there was a hate --

10 **THE COURT:** Where does that viral post say anything  
11 about plaintiff's village?

12 **MR. PERLSTADT:** Well, it doesn't, Your Honor. And  
13 we -- we -- and I agree. I agree. We will have to show -- we  
14 will have to show -- it's a fact question, but we will have to  
15 show --

16 **THE COURT:** You still have to allege -- to get  
17 through the gate, you have to allege.

18 **MR. PERLSTADT:** Absolutely. But I think we have --  
19 we have alleged -- we -- we have alleged that these things  
20 happened in 2012. We allege that these created this  
21 environment of -- of hate. And we will have to rely --

22 **THE COURT:** Taking the allegations in the complaint  
23 as true, you indicate that the ethnic violence had been  
24 occurring for decades. And if they had been occurring for  
25 decades, it is not clear to me how the complaint alleges the

1 plausible inference that this -- that this business activity  
2 was used to perpetuate that violence by a military regime that  
3 was already engaged in deplorable violence.

4 **MR. PERLSTADT:** It's a matter of degree, Your Honor.  
5 And -- and I think the plausibility of our allegations I think  
6 is confirmed by the -- the chairman of UN fact-finding  
7 commission found that Facebook played a determining role in  
8 ethnic violence.

9 A member of Facebook's integrity team used this kind of  
10 evidence to conclude that working for Facebook, he had been a  
11 party to genocide. I think our allegations are plausible.

12 Yes, we don't have at this point the kind of granular  
13 information that's in Facebook's unique possession about what  
14 posts were where and what members of the military were doing  
15 what.

16 We -- we do -- but we do allege in the complaint that  
17 those things are out there. In paragraph 133, we allege that  
18 Facebook has records of every post and image that was posted,  
19 that most soldiers had Facebook on their phones so Facebook  
20 has records of their locations. And in paragraphs 143 and  
21 144, we allege that Facebook acknowledged removing -- we think  
22 much too late, but they removed these --

23 **THE COURT:** Slow down.

24 **MR. PERLSTADT:** -- dangerous accounts and that they  
25 are preserving data including content.

1 Yes, we don't have access to this data, but I think what  
2 we're alleging is plausible. And I think at the pleading  
3 stage, this fact question about causation can -- was -- I  
4 think it's clear from the UN fact-finding mission and some of  
5 Facebook's acknowledgments that they were contributing to the  
6 ethnic violence.

7 Yes, we will have to connect the dots between the --

8 **THE COURT:** All right. A response.

9 **MS. RING:** Your Honor, as we -- in stepping through  
10 each of these allegations, I mean it -- again, I guess I go  
11 back to this is a putative class action and there's a named  
12 plaintiff. And the named plaintiff has to state a claim. The  
13 named plaintiff says that her harm was an attack in her  
14 village in 2012.

15 There's -- there are no facts in the complaint to support  
16 any plausible inference that those attack -- that that attack  
17 had anything to do with Facebook, whatever happened after.

18 And as for what happened after, each of these -- each of  
19 these allegations, the UN reports, the UN reports talk about,  
20 as Your Honor just explained, decades of ethnic violence going  
21 on in the country. Decades.

22 Three decades before, 300,000 Rohingya people had to flee  
23 the country, before -- three decades before Facebook ever was  
24 introduced there.

25 Those UN reports also talk about multiple different ways



1 that these hateful messages were spread, Facebook being one of  
2 them. But again, that -- that is not enough to establish any  
3 link between Facebook and what happened in 2012 or after.

4 And the chairman, you know, determining role, that was not  
5 in the report. That was in a press conference that he gave.

6 So, again, I just don't -- we don't think there -- there  
7 is a single factual allegation that supports a reasonable  
8 inference for what this plaintiff has to establish.

9 **THE COURT:** There are other problems.

10 And I disagree with you. I don't think that the way it's  
11 alleged is plausible. There has to be some more connection.

12 What about statute of limitations? This is governed by a  
13 two-year statute. The injury occurred in 2012. You're  
14 required to plead facts to show the time and manner of  
15 discovery and the inability to have made the discovery earlier  
16 despite reasonable diligence.

17 Now maybe there's two years of tolling because the  
18 plaintiff was 16. But at this juncture, it's not clear from  
19 the complaint how you get past the statute of limitations.

20 **MR. PERLSTADT:** Two responses, Your Honor.

21 One is, as we note in our response, we do think that this  
22 is a continuing harm. Facebook is -- is continuing to engage  
23 in this conduct. It continues to make Burma unsafe for  
24 plaintiff. She can't return home. We think the statute of  
25 limitations frankly hasn't even started to run.

1 That said, if we are only looking at the 2012 injury, she  
2 did not discover Facebook's role in causing it until 2021.  
3 And as, you know, claims don't accrue until plaintiff  
4 discovers the cause of action, not the injury, but the cause  
5 of action.

6 **THE COURT:** She has to be -- there has to be  
7 reasonable diligence. What has she done --

8 (Simultaneous colloquy.)

9 **MR. PERLSTADT:** All she knows is that her village was  
10 attacked, she was scared for her life, her property was  
11 destroyed, her home was taken, she flees the country. She has  
12 no idea that Facebook is behind this. And --

13 **THE COURT:** Behind what specifically? So I mean  
14 that's part of the problem. You have to -- you've got to  
15 identify something that they actually did to incite and then  
16 tie that to her own learning of the alleged claim.

17 **MR. PERLSTADT:** We allege that she did not learn of  
18 this until 2021 when it -- when this information that Facebook  
19 could have some responsibility could be a substantial factor  
20 in her --

21 **THE COURT:** You need to slow down.

22 **MR. PERLSTADT:** I apologize, Your Honor.

23 We -- we do allege that in 2021, she discovered this --  
24 the fact that Facebook may have been a substantial factor in  
25 her harm, in 2021, when that information became known to the

1 community -- the Rohingya community in the United States that  
2 she's a part of.

3 I think this idea that she has a duty to investigate is  
4 putting an impossible burden on her. And a duty to  
5 investigate only arises --

6 **THE COURT:** So I don't --

7 **MR. PERLSTADT:** -- if there's something to arouse  
8 suspicion. And there's nothing to arouse suspicion that  
9 someone else might be responsible.

10 **THE COURT:** It may be. But it's what the California  
11 Supreme Court said.

12 **MR. PERLSTADT:** Yes. But the California Supreme  
13 Court, I -- I believe it's the *Ethicon* case that I'm thinking  
14 of. It's -- a person was injured during surgery. And so  
15 they -- they have a malpractice claim. They know they've been  
16 injured. They have a malpractice claim against the surgeon.

17 And then years later they learn that, oh, darn it, it was  
18 actually also the medical device that was implanted so I may  
19 also have a claim against the medical device manufacturer.

20 But it's -- it's not clear that -- once you know of an  
21 injury, I don't think you have a duty to explore all possible  
22 potential causes of this. People didn't know that Facebook  
23 was necessarily involved in this until much later. And it  
24 certainly didn't -- didn't infiltrate into the Rohingya  
25 community. She's -- she's -- does not speak English. She

1 does not read or write English. I'm not even sure she's  
2 functionally literate in her own language.

3 The idea that she had -- that she didn't look hard enough  
4 as to whether a social media company might have had some  
5 substantial role in the harm incurred upon her in 2012, I  
6 just -- it feels like an impossible standard, and I don't  
7 believe that that's what the California Supreme Court  
8 requires.

9 We allege that she didn't discover until 2021. They don't  
10 dispute that allegation, that she didn't dispute -- that she  
11 didn't find out until 2021. We explain that based on language  
12 barriers, based on the struggle that she's had coming to  
13 America, running away from ethnic violence, she wasn't able to  
14 discover all these things that Facebook did and knew.

15 And I think that it's -- she -- it's -- it's appropriate  
16 to, and consistent with California law, to say that the  
17 discovery rule applies here.

18 **MS. RING:** Your Honor, we're sympathetic to the  
19 plaintiff's situation and so is California law. The question  
20 is what a reasonable person in the plaintiff's position would  
21 have done to exercise reasonable diligence.

22 And the law is clear that a plaintiff has to allege facts  
23 setting forth the time and manner of discovery. We don't have  
24 the manner of discovery. And in opposition plaintiff said it  
25 was the lawyers who told her.

1 And the second, though, is really important to this  
2 discovery rule and to the statute of limitations in general.  
3 It's the facts to show the inability to have made earlier  
4 discovery despite reasonable diligence.

5 Again, it takes her as she is, but there are no facts in  
6 this complaint to say that -- that she did anything. And it's  
7 particularly noteworthy because the complaint is also full of  
8 reports and news reports and talking about this from 2015 to  
9 2018.

10 We don't know from the complaint did she come -- when she  
11 fled Burma, did she arrive in the United States within a year,  
12 or did she just arrive in 2020? Did she live in a Rohingya  
13 community? Did -- we don't know anything that would support a  
14 reasonable inference that she couldn't have learned of  
15 these -- these facts sooner than she did based on reasonable  
16 diligence. That's what the law requires. And there's nothing  
17 in the complaint to help us make that determination at all.

18 **THE COURT:** Yeah, I agree. It is the plaintiff's  
19 burden to show diligence. And frankly, you know, I don't even  
20 know how you do that at this point because there aren't  
21 allegations in the complaint.

22 The statute of limitations is going to be there for every  
23 potential class member when these things happened in 2012 if  
24 you've not figured out how it is that you're going to show  
25 diligence.

1           **MR. PERLSTADT:** I just --

2           **THE COURT:** That -- and I mean -- and it is the rule.  
3 I mean --

4           **MR. PERLSTADT:** It is the rule. But there are cases,  
5 and I'll -- I'll point you to the *Unruh-Haxton* case that we  
6 cite in our briefs as well, that suggest that public reports  
7 about information that's not obvious is not going to be  
8 enough.

9           I believe in the *Unruh* case, it was women who had had eggs  
10 harvested for in vitro fertilization later found out  
11 through -- or it later became discovered that -- that the -- I  
12 believe the University of California system was -- or certain  
13 doctors were stealing that genetic material, and plaintiffs  
14 had no clue that they were injured by the people stealing this  
15 information.

16           And the fact that there were public reports about this,  
17 that news reports came out is not what triggers that. And I  
18 think that's especially true in our case when we have  
19 significant language barriers, when we have significant  
20 cultural barriers.

21           So I think -- I agree, California law applies. I urge you  
22 to look at *Unruh-Haxton* --

23                               (Simultaneous colloquy.)

24           **THE COURT:** Well, you're going to go back. I'm not  
25 going to go look again. I'm telling you now that --

(Simultaneous colloquy.)

**THE COURT:** -- there is a problem. And it is your burden to allege facts that are going to get you over this hump. And I'll look at it again. But I'm not going to look at it again now because I'm already telling you that there's an issue.

**MR. PERLSTADT:** I appreciate that. Understood.

**THE COURT:** All right. Let's move to negligence.

Again, here we've got to have some measure of a duty. And under California law, Meta can only be liable where, one, there is a special relationship that creates a duty, and two -- or two, that it engaged in an act that increased the risk of harm.

So it doesn't sound like there is a special relationship. There are no allegations that allege a special relationship. Do you agree?

**MR. PERLSTADT:** Agree. We're not pursuing -- we're not pursuing on a special relationship.

**THE COURT:** So then the question is the -- increasing the risk of harm. And here, you pretty much ignore the *Rowland* factors. And you've got to engage with those factors in determining or in pleading a general duty.

I'll start with the defense at this point.

**MS. RING:** Well, Your Honor, we agree that the complaint does not have adequate allegations to support a duty

1 here. I would say, and I apologize, we submitted some  
2 supplemental authority yesterday, I believe. It was an *Uber*  
3 case decided by the California Court of Appeal. And on that  
4 element of increasing the risk of injury, the California  
5 Supreme Court in *Brown* said it's not just increasing the risk  
6 of injury, it's increasing it in a meaningful way.

7 The California Court of Appeal in *Uber* explained that what  
8 that means is that the risk that's created has to be a  
9 necessary component of the defendant's conduct, and went on to  
10 describe how -- what that means is it's not just creating the  
11 opportunity for the harm to the plaintiff, but it actually has  
12 to be a necessary component of the defendant's conduct.

13 So here, the question is, you know, Facebook is a  
14 communications platform and plaintiffs allege that the Myanmar  
15 military abused it. But it's used for all sorts of things.  
16 Use by a military government to foment ethnic division and  
17 then conduct a genocide is not a necessary component of  
18 Facebook.

19 People send pictures of their grandkids and their pets,  
20 and it's not a necessary component. So we don't think there's  
21 any fact that plaintiffs can allege to establish what is  
22 generally termed as misfeasance, meaning something that  
23 creates a risk that actually then could lead to a duty.

24 And, Your Honor, we also agree, as Your Honor referenced,  
25 the *Netflix* case earlier and the factors, again, it's a



1 communications platform and so -- and one that's used for all  
2 sorts of things. And to impose a duty based on something that  
3 someone does after viewing something on the platform, we don't  
4 think is supported by the *Rowland* factors at all.

5 **THE COURT:** So I'm pulling up the docket because I  
6 don't -- I'm not sure it was the *Uber* case that was submitted.

7 **MS. RING:** Oh, you know, what, Your Honor? I'm  
8 sorry. You're right. It was the --

9 (Simultaneous colloquy.)

10 **MS. RING:** *Jackson v. Airbnb*. I apologize.

11 **THE COURT:** Okay. So do you have an *Uber* cite so  
12 that the plaintiff can look at that one as well?

13 **MR. PERLSTADT:** I've looked at it, Your Honor.

14 **THE COURT:** You've looked at it?

15 **MR. PERLSTADT:** I saw it yesterday. Yes, thank you.

16 **THE COURT:** All right. Go ahead.

17 (Off-the-record discussion.)

18 **MR. PERLSTADT:** Oh, I'm sorry. The *Airbnb*, I don't  
19 know the case she's referring to.

20 **CERTIFIED STENOGRAPHIC REPORTER:** I'm sorry. You  
21 really need to slow down --

22 **MR. PERLSTADT:** I'm so sorry.

23 **CERTIFIED STENOGRAPHIC REPORTER:** -- and only speak  
24 one at a time, please.

25 **MR. PERLSTADT:** I have seen the *Airbnb* case. I

1 apologize. I am not -- I don't know which *Uber* case she's  
2 referring to.

3 **MS. RING:** Okay. It's -- the cite is  
4 79 Cal. App. 5th, and the necessary component standard is  
5 articulated at pin cite 427.

6 **THE COURT:** Okay. Well, I've not looked at it  
7 either. But, again, we're going to go through another round  
8 here so make sure to take a look.

9 You can respond.

10 **MR. PERLSTADT:** Thank you, Your Honor.

11 So with respect to the -- yes, we don't allege -- or we  
12 don't -- we're not proceeding under a special relationship  
13 theory. As you identified, special relationships are only  
14 required when trying to establish liability through  
15 nonfeasance. And here we are alleging misfeasance. So many  
16 of the cases they cite in their briefs, and the *Airbnb* case  
17 they cite, they submitted yesterday, are all nonfeasance  
18 cases.

19 For example, in *Airbnb*, there certainly weren't -- *Airbnb*,  
20 that case involved whether Airbnb was liable for a shooting  
21 that took place at one of the rental properties. And I don't  
22 believe there were allegations in that case that Airbnb was  
23 encouraging and amplifying incitements to violence on their  
24 property, which is what we have here.

25 We have -- we have allegations of misfeasance here. And

1 so this case falls under -- not under special relationships,  
2 but under the general duty of reasonable care under California  
3 law. Everyone owes --

4 **THE COURT:** But -- but --

5 **MR. PERLSTADT:** -- a general duty to exercise  
6 reasonable care for the safety of others.

7 **THE COURT:** Okay. But it sounds like your complaint  
8 is amplification generally, that is, the actions of Meta are  
9 inappropriate because they amplified whatever somebody else  
10 was doing.

11 **MR. PERLSTADT:** And encouraged.

12 **THE COURT:** So Meta doesn't get paid by people who  
13 are happier because they've amplified happy things, but we  
14 want to hold them responsible for amplifying things that we  
15 don't like; is that what you're saying?

16 **MR. PERLSTADT:** We're saying they encouraged and  
17 amplified, incentive -- yes --

18 (Simultaneous colloquy.)

19 **THE COURT:** And just generally, that is, there are no  
20 implications that they amplified this specifically to this  
21 specific situation, it's just the nature of the -- it's the  
22 nature of the beast. The beast amplifies whatever the input  
23 is. That's your claim.

24 **MR. PERLSTADT:** Yes. But there's no intent  
25 requirement for negligence. If I'm -- if I'm speeding, my

1 intent is not to hit a child when I speed, but I can still be  
2 held -- I have a duty not to speed to not hit a child.

3 **THE COURT:** Doesn't matter whether you're speeding or  
4 not. If you hit the child, you hit the child.

5 **MR. PERLSTADT:** But I have a duty to act reasonably.  
6 If I'm -- if I'm obeying the law and a child jumps out in  
7 front of me and there's nothing I could reasonably do, then I  
8 won't be -- I don't believe I'll be liable. There's no strict  
9 liability. That's -- that's -- we're talking about negligence  
10 now.

11 So that you have a general duty to act in a manner that --  
12 in a reasonable manner that doesn't harm other people.

13 If Facebook was reasonable here, by all means, they're not  
14 liable. But that's a breach question. And I sort of think  
15 Facebook is trying to make breach questions into duty  
16 questions because breach is not something that can be decided  
17 on a motion to dismiss. Those are fact questions.

18 Duty is a legal question, and I think the --

19 **THE COURT:** Duty --

20 (Simultaneous colloquy.)

21 **MR. PERLSTADT:** I'm sorry?

22 **THE COURT:** A duty of reasonable care is evaluated  
23 under *Rowland*.

24 **MR. PERLSTADT:** I would push back on that a little  
25 bit. *Rowland*, the purpose of *Rowland* -- and this is from

1 *Brown*, 2021 California Supreme Court.

2 The purpose of the *Rowland* factors is to determine whether  
3 relevant circumstances warrant limiting a duty already  
4 established. It's not about whether we recognize legal duties  
5 in new contexts. We don't say, oh, look to *Rowland* to decide  
6 whether there is a duty here.

7 We look to *Rowland* to decide whether, oh, in light of the  
8 general duties or in light of another duty, maybe we shouldn't  
9 have a duty here.

10 I think the paradigmatic case of application of the  
11 *Rowland* factors is *Castaneda v. Olsher*, which is discussed in  
12 the *Brown* case. And in that case, despite -- despite a  
13 general duty of landlords to protect tenants, including from  
14 other tenants, requiring landlords to withhold renting units  
15 to those they believe to be gang members would result in  
16 arbitrary discrimination. California Supreme Court didn't  
17 think that was a workable solution anyway.

18 So the Supreme Court there said --

19 (Interruption by the Certified Stenographic Reporter.)

20 **MR. PERLSTADT:** I'm sorry. Too fast again.  
21 Apologize.

22 So the -- the Supreme Court there, in *Castaneda*, as  
23 explained in *Brown*, said that there were clear considerations  
24 of policy that justified carving out such a requirement from  
25 an otherwise applicable duty. So that's how *Rowland* works.

1           Rowland is about, oh, there's a duty. Facebook has a  
2           general duty. Maybe in this circumstance, we should -- there  
3           are clear considerations of policy to carve out a duty --  
4           carve out from the general duty these circumstances. That's  
5           how *Rowland* works.

6           And here, there are no clear considerations of policy that  
7           would justify carving out from the general duty of care a duty  
8           not to encourage and amplify incitements to violence.

9           **THE COURT:** What about all the cases that say there's  
10          a reluctance to impose a duty if it undermines First Amendment  
11          expression? There are lot of cases against you on that front.

12          **MR. PERLSTADT:** I think -- I'd be curious which ones  
13          you think specifically. But with respect to Facebook just  
14          sort of feints at restraining expression and chilling Internet  
15          free speech as a policy.

16          But I think to the extent there are policy considerations  
17          governing whether to hold social media companies liable for  
18          things posted on their sites, the CDA makes that policy  
19          balance.

20          So depending on -- on how the CDA shakes out, I don't  
21          think *Rowland* justifies imposing some other additional or  
22          different policy justifications on --

23          **THE COURT:** How is this case any different from *The*  
24          *Estate of B.H. v. Netflix* case I've already decided?

25          How is it any different?

1           **MR. PERLSTADT:** I'd have to go back. I don't believe  
2           that was cited in the briefs. I'd have to go back and look at  
3           the -- if you could remind me of the facts, I'm happy to  
4           discuss it, but I apologize for not having it at the tip of my  
5           tongue right now.

6           **THE COURT:** Netflix had disseminated a video -- and  
7           it was in the reply -- called *13 Reasons Why*. And someone  
8           died. Tragic.

9           **MR. PERLSTADT:** And did you find that there was no  
10          duty to -- that Netflix didn't have a duty not to --

11          **THE COURT:** I had -- well, I declined to hold them  
12          liable on a negligence theory.

13          **MR. PERLSTADT:** I apolo- -- I would offer to --

14          **THE COURT:** Go ahead.

15          **MR. PERLSTADT:** -- to draft a surreply, but we're  
16          going to have to -- sounds like we're going to have to rebrief  
17          this anyway.

18          **MS. RING:** Your Honor, we think *Netflix* clearly  
19          applies here.

20          And I would just say on the other points that the Court  
21          has described the standard here correctly. Obviously  
22          there's -- under *Brown* there's a -- there's two steps.  
23          Plaintiffs can't make it past the first step which is a  
24          special relationship or misfeasance.

25          The second step, then, is the *Rowland* factors. And we

1 also believe that -- and I think as -- again you accurately  
2 described, the question is whether a duty should be imposed  
3 even if the first step can be overcome. And we think it can't  
4 for the reasons that you -- among others, for the reasons you  
5 explained in *Netflix*.

6 **THE COURT:** Okay. One last issue, and that is -- and  
7 maybe I should have started here.

8 But the question is CAFA jurisdiction. You have indicated  
9 to me that the plaintiff is a resident of Illinois. But is  
10 she a citizen of Illinois? Is that her permanent domicile?  
11 If not, I mean -- and people confuse this all the time,  
12 lawyers confuse it all the time. Residence isn't sufficient.  
13 We need -- we need citizenship. And citizenship can be  
14 defined as permanent domicile, but resident is not enough.

15 **MR. PERLSTADT:** To be fair, we filed in state court  
16 so the burden is on defendant -- they removed. And Facebook  
17 alleged minimal diversity in its removal papers.

18 We didn't dispute those allegations, the diversity  
19 allegations in the removal.

20 I believe under *Ehrman v. Cox Communications* in the Ninth  
21 Circuit, 2019, that that is enough for jurisdiction here. If,  
22 on removal, defendant alleges minimal diversity and those  
23 factual allegations are not disputed, that jurisdiction is  
24 secure. But I -- I -- to be fair, the burden is on defendant  
25 to be -- to establish jurisdiction here.



1           **THE COURT:**   Okay.

2           All right.   How much time do you want to revise your  
3   complaint?

4           **MR. PERLSTADT:**   Following an order from this Court?

5           **THE COURT:**   No.   This is your order.   It's --

6           **MR. PERLSTADT:**   This.

7           **THE COURT:**   -- granted with leave to amend.   Get the  
8   transcript.

9                               (Off-the-record discussion.)

10          **MR. PERLSTADT:**   90 days, Your Honor.

11          **THE COURT:**   All right.   90 days to amend.   That puts  
12   us mid-March.

13          When do you want to respond?

14          **MS. RING:**   Your Honor, could we have 60 days, please?  
15   I don't have my calendar in front of me.

16          Your Honor, to save you time, maybe we could meet and  
17   confer with plaintiffs and submit some proposed briefing  
18   schedule.

19          **THE COURT:**   That's fine.

20          **MS. RING:**   Thank you.

21          **THE COURT:**   All right.   But the order will have  
22   90 days to amend.

23          **MR. PERLSTADT:**   Thank you, Your Honor.

24          **THE COURT:**   Okay.   Once in a while we get to rule  
25   from the bench to again help our dockets.

1           **MR. PERLSTADT:** Appreciate it.

2           **THE COURT:** Okay. Everybody have a happy holiday and  
3 Happy New Year. We're adjourned.

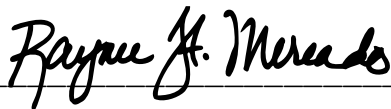
4           **MS. RING:** Thank you, Your Honor.

5           (Proceedings were concluded at 10:38 A.M.)

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10                           **CERTIFICATE OF REPORTER**

11  
12           I certify that the foregoing is a correct transcript  
13 from the record of proceedings in the above-entitled matter.  
14 I further certify that I am neither counsel for, related to,  
15 nor employed by any of the parties to the action in which this  
16 hearing was taken, and further that I am not financially nor  
17 otherwise interested in the outcome of the action.

18  
19                           

20           Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

21                           Sunday, December 18, 2022  
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